

DAVIDSON CONSULTING CO., INC.

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**WASTE MANAGEMENT, INC.**  
**OF TENNESSEE,**

**Petitioner,**

**vs.**

**SOLID WASTE REGION BOARD**  
**of the METROPOLITAN GOVERNMENT OF**  
**NASHVILLE AND DAVIDSON COUNTY,**

**Respondent,**

**CHRIS UTLEY, BRENDA GILMORE,**  
**MATTHEW WALKER, ARTHUR HARRIS,**  
**FRANCIS UTLEY, JOHNIENE THOMAS,**  
**PATSY CHRISTMAN, KENNETH CAINE,**  
**MELVIN FERGUSON, and VANNA**  
**FERGUSON,**

**Respondent-Intervenors.**

**No. 04-2501-II**

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## MEMORANDUM AND ORDER

The Petitioner, Waste Management, Inc. of Tennessee (“Waste Management”), seeks judicial review of a decision by the Solid Waste Region Board of Nashville and Davidson County (“the Board”) denying the Petitioner’s application for an expansion of its Southern Services landfill. The Court has considered the oral arguments, the briefs of counsel and the entire administrative record, and is now prepared to rule.

### Summary of Facts and Procedural History

Waste Management is a Tennessee corporation that owns and operates the Southern Services

Landfill, which is located in an area zoned for industrial activity in the rural northwestern corner of Davidson County, Tennessee. The Southern Services Landfill is designated a Class III/IV landfill; as such, it accepts only construction and demolition waste and landscaping and land clearing waste, not domestic, commercial or industrial waste. The Petitioner holds permit number DML 19-0032, issued by the Tennessee Department of Environment and Conservation's ("TDEC") Division of Solid Waste Management, for this landfill. This permit currently allows disposal of waste on 71.5 acres.

On March 7, 2003, Waste Management submitted to the Board an application for an expansion of its Southern Services Landfill. The expansion would add approximately 7 acres of land located between two areas that have already been filled with waste. The Board considered the application for an expansion at its May 13, 2003 meeting, and unanimously approved the application. Waste Management subsequently submitted its application for an expansion to TDEC, which conducted a review of the application over the next 10 months. After completing a review of the technical and environmental aspects of the application, TDEC conducted public hearings, and ultimately decided to approve Waste Management's application for the 7-acre expansion of its landfill. The written approval was issued by TDEC on May 17, 2004.

The potential impact of the expansion on an area of wetlands located on Waste Management's property necessitated a review of the application by TDEC's Division of Water Pollution Control. After reviewing the application, that Division of TDEC issued ARAP<sup>1</sup> permit number NRS 03-246 to Waste Management on January 27, 2004. The permit contains conditions designed to ensure that there will be a net gain in the number of acres of wetlands on Waste Management's property when the landfill is

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<sup>1</sup>Aquatic Resource Alteration Permit

completely filled.

On June 7, 2004, Waste Management also received approval of the U.S. Army Corps of Engineers for its proposed landfill expansion.<sup>2</sup>

In early April of 2004, members of the public questioned whether the Board had given adequate notice of its May 13, 2003 meeting. T.C.A. § 68-211-814(b)(2)(E) requires that public notice of the Board's meetings be given in accordance with Title 8, Chapter 44, popularly known as the Sunshine Law. The Board had published notice of its May 13, 2003 meeting in the Tennessean, but a question arose as to whether the notice contained sufficient details about the meeting and whether the notice was published far enough in advance of the meeting to be constitutionally sufficient.

The Board met on April 21, 2004 to hear from members of the public regarding the adequacy of the public notice of its May 13, 2003 meeting. After discussing the issue and hearing comments from the landfill opponents who attended this meeting, the Board decided not to reconsider its action of May 13, 2003 approving Waste Management's application to expand the Southern Services Landfill by 7 acres.

The Board's action of April 21, 2004 was communicated to TDEC. Approximately a month later, on May 17, 2004, TDEC issued its written approval of Waste Management's application for the expansion.

On May 18, 2004, the day after TDEC approved Waste Management's application, opponents of Waste Management's application formed a nonprofit corporation, Bordeaux Beautiful, Inc. On May 20, 2004, Bordeaux Beautiful, Inc. filed suit in the Davidson County Chancery Court, seeking injunctive

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<sup>2</sup>The Corps reviewed the application because of its possible impact on wetlands.

relief against Waste Management, the Board and TDEC. After oral argument on June 3, 2004, Chancellor Ellen Hobbes Lyle issued an order on June 4, 2004 requiring the Board to conduct another meeting, after giving proper public notice of that meeting, “to decide the permit application of Waste Management.” Her decision was based entirely on a finding that the Board did not comply with the requirements of the Sunshine Law with respect to its May 13, 2003 meeting at which the Board approved Waste Management’s application. The Chancellor expressed no views on the merits of the application.

In compliance with the Chancellor’s order, the Board held a meeting on July 27, 2004, and for a third time considered Waste Management’s application for a 7-acre expansion of its Southern Services Landfill. This time, however, the Board rejected Waste Management’s application by a 6 to 3 vote.

Waste Management timely filed the present action with the Davidson County Chancery Court on August 26, 2004. This Court heard oral arguments in this matter on January 14, 2005.

## **CONCLUSIONS OF LAW**

### **A. Standard of Review**

The Court reviews the Board’s decision pursuant to T.C.A. § 68-211-814(b)(2)(D), which provides for the same type of review as set forth under the Uniform Administrative Procedures Act, T.C.A. § 4-5-101 et seq. Under this standard, the decision must be upheld unless the Court finds that it was:

- (1) In violation of constitutional or statutory provisions,
- (2) In excess of the statutory authority of the agency,
- (3) Made upon unlawful procedure,
- (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (5) Unsupported by evidence which is both substantial and material in the light of the entire record.

T.C.A. § 4-5-322(h). Substantial and material evidence has been defined by Tennessee courts as

"something less than a preponderance of the evidence, but more than a scintilla or glimmer." *Wayne County v. Tennessee Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 280 (Tenn. Ct. App. 1988) (citations omitted). The Board's decision to deny the Petitioner's application for an expansion of its Southern Services landfill is supported by substantial and material evidence if the record of the proceedings contains "such relevant evidence as a reasonable mind might accept to support a rational conclusion." *Clay County Manor v. State of Tennessee Dept. of Health and Environment*, 849 S.W.2d 755, 759 (Tenn. 1993). The Court may not reweigh the evidence, *Humana of Tennessee v. Tennessee Health Facilities Comm'n*, 551 S.W.2d 664, 667 (Tenn. 1977), and the Board's decision need not be supported by a preponderance of the evidence. *Street v. State Board of Equalization*, 812 S.W.2d 583, 585-586 (Tenn. Ct. App. 1990). The evidence will be sufficient if it furnishes a reasonably sound basis for the decision being reviewed. *Wayne County*, 756 S.W.2d at 279. The Board's action is arbitrary and capricious if it is not based on any course of reasoning, or exercise of judgment, or if there is a clear error in judgment. T.C.A. 4-5-322(h)(4); *Jackson Mobilphone Company v. Tennessee Public Service Comm'n*, 876 S.W.2d 106, 110-111 (Tenn. Ct. App. 1993).

### **B. Analysis**

In the present case, Waste Management contends that the Board's decision of July 27, 2004 is arbitrary and capricious and is an abuse of the Board's discretion. It also argues that the Board has exceeded its authority under Tennessee law and that the decision is not supported by substantial and material evidence.

T.C.A. § 68-211-814(b)(2)(B) sets out the standard that the Board must adhere to in determining whether to grant an application for expansion of a landfill:

[t]he [Board] may reject an application for . . . expansion of an existing solid waste disposal facility . . . within the region only upon determining that the application is inconsistent with the solid waste management plan adopted by the county or region and approved by the department, and the [Board] shall document in writing the specific grounds on which the application is inconsistent with such plan.

T.C.A. § 68-211-814(b)(2)(B).

In 1992, upon its creation by the Metropolitan Council, the Board prepared and approved a Solid Waste Management Plan for the Metropolitan Nashville and Davidson County region. The Plan, dated July 1, 1994, was submitted to TDEC as required by T.C.A. § 68-211-814(a)(1) and was approved by TDEC on November 3, 1994. The 1994 plan contains the following provision on Construction and Demolition Landfills:

The Metro Solid Waste Region Board has voted to continue the use of the existing Southern Services Class IV landfill, *to allow the permitting of an expansion of that landfill* and, to the extent needed, allow the development of additional Class IV landfills within the Metro Region.

1994 Metro Region Solid Waste Management Plan, “Construction and Demolition Landfills”, p. 11-5 (emphasis added).

As required by T.C.A. § 68-211-814(a)(2), the Board reconsidered and revised the Plan in 1999. The Metropolitan Council approved the revisions to the Plan on November 16, 1999. The revisions echo the original language concerning Construction and Demolition Landfills:

Construction and Demolition Landfills: The Plan continues the use of the existing Southern Services Class IV landfill, *allows permitting of an expansion of that landfill* and, to the extent needed, allows the development of additional Class IV Landfill [sic] within the Region, provided such sites are approved by the Metro Council and permitted by the State of Tennessee Division of Solid Waste Management.

1999 Revisions of Metro Region Solid Waste Management Plan, “Construction and Demolition Landfill”, p. 20, ¶16 (emphasis added).

The 1999 revisions are the only revisions of the 1994 Plan made by the Board prior to its July 27, 2004 action rejecting Waste Management's application. Thus, the Board could legally reject Waste Management's application only if that application is inconsistent with the provisions of the 1994 Plan as revised by the Board in 1999.

T.C.A. § 68-211-814(b)(2)(B) provides that a regional board must "document in writing the specific grounds on which the application is inconsistent with the region's approved plan" if the board decides to reject the application. To comply with that section of the statute, John Sherman, chairman of the Board, sent a letter to TDEC Commissioner Betsy Child dated July 29, 2004, listing four reasons for the Board's rejection of Waste Management's application:<sup>3</sup>

- 1) Per page 11-5 of the 1994 Solid Waste plan, the company did not find a replacement site by 1997.
- 2) Per page 11-5 of the 1994 Solid Waste plan, the Metropolitan Government did not pursue a replacement site.
- 3) The operations of the applicant do not include any recycling or sorting as mandated by the plan.
- 4) Approval of the application would violate a conservation easement into which the company previously entered.

The Court addresses each of these rationales for denying the expansion permit.

***1. The company did not find a replacement site by 1997.***

The first rationale relies upon a paragraph entitled "Schedule" that follows the 1994 Plan language set forth above. This paragraph states

Since this is a private facility, implementation schedules are subject to the desires of the

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<sup>3</sup>Waste Management alleges that the Board did not send a copy of this letter to Waste Management or its attorney, even though Waste Management was the applicant whose rights were being decided by the Board.

owner. From conversations with the owner, expansion plans for the existing facility are under consideration. At the present disposal rate, it has been estimated that this facility has seven more years of capacity. It is anticipated that prior to this time a replacement site will be commercially developed. If not, then Metro government officials will pursue development of a replacement facility by 1997. It has been stated that such a facility would be located on a parcel of land in Davidson County known as the Kodak site.

1994 Metro Region Solid Waste Management Plan, "Construction and Demolition Landfills" p.11-5.

This section is unambiguous, and reveals no directive mandating that Waste Management find a replacement landfill site by 1997. It shows that in 1994, the Board "estimated" that the Southern Services facility had enough capacity for seven more years of use<sup>4</sup> and it was "anticipated" that prior to that time, a replacement site would be commercially developed. The above-quoted paragraph lacks a mandatory component. Furthermore, a review of the 1999 Plan language shows no reference whatsoever to replacement landfill sites. Instead, the 1999 Plan states that it "continues, the use of the existing Southern Services Class IV landfill [and] allows permitting of an expansion of that landfill." It is axiomatic that rules, regulations, or legislative enactments should be interpreted in their natural and ordinary sense, without a forced construction to either limit or expand their meaning. *State v. Cross*, 93 S.W.3d 891, 894 (Tenn. Crim. Ct. App. 2002). Accordingly, the Court finds that the Board's decision to deny an expansion permit to Waste Management, based on that company's failure to find a replacement site by 1997, is not based on any course of reasoning and is thus arbitrary and capricious.

## ***2. Metro did not find a replacement site by 1997.***

The second rationale for denying an expansion permit to Waste Management is based upon the

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<sup>4</sup>This was an erroneous estimate, evidenced by the fact that the landfill is still in operation. Furthermore, according to Glenn Youngblood, Waste Management's Director of Landfill Operations, who testified at the July 27, 2004 hearing, the landfill can presently continue accepting waste until 2010, and with the 7-acre expansion, it will have the capacity to last until 2018.



same language from the 1994 Plan as set forth above. "At the present disposal rate," the plan states "it has been estimated that this facility has seven more years of capacity." Based on this estimate that the landfill would be filled by 2001, the Plan stated that if no new site was commercially developed, then "Metro government officials will pursue development of a replacement facility by 1997" and that "it has been stated that such a facility would be located on a parcel of land in Davidson County known as the Kodak site."

The Intervenor's contend that because Metro government officials did not produce a replacement facility by 1997, that Waste Management's application for an expansion permit must be denied pursuant to T.C.A. § 68-211-814(b)(2)(B) as "inconsistent with the solid waste management plan" adopted by the Board. However, both the 1994 and 1999 Plans specifically state that the Southern Services landfill was to be granted permits to allow for expansion. The Court notes that the 1994 Plan's estimate that the Southern Services landfill would be filled by 2001 proved to be inaccurate, and that this language was conspicuously absent from the 1999 Plan.<sup>5</sup> The Plan imposed no affirmative obligation on Metro to pursue development of a construction and demolition waste landfill site. The Court will not impose an obligation upon a party when the drafters of the Plan expressed no intent to do so. *See Brown v. Knox County*, 39 S.W.3d 585, 588 (Tenn. Ct. App. 2000). The Board's rejection of an expansion permit on the basis that the Metro Government failed to pursue development of a replacement landfill is not supported by the record.

***3) The operations of the applicant do not include any recycling or sorting as mandated by the plan.***

The third rationale is based upon the Intervenor's blanket statement that the 1994 Plan required the

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<sup>5</sup>The Kodak site mentioned in the 1994 Plan, acquired by Metro in the early 1990's for possible use as a Class I landfill, was transferred to the Metro Parks Department by Mayor Bill Purcell for use as a Metro Park.

Southern Services landfill to engage in sorting/recycling. The Intervenor's cite to a page from the 1994 Plan<sup>6</sup> in support of this contention, but have failed to specify the language on which they rely. The Court notes that the portion of the Plan submitted with the Intervenor's Response brief appears to deal with the sorting and separating of materials that will be incinerated at the Nashville Thermal Transfer Corporation or that will be sent to a Class I landfill for disposal. As such, both the Board's rationale and the Intervenor's argument are confusing and irrelevant.

The State of Tennessee's Waste Reduction Goal, set forth at T.C.A. § 68-211-861(a), states as follows:

The goal of the state is to reduce by twenty-five percent (25%) the amount of solid waste disposed of at *Class I municipal solid waste disposal facilities and incinerators*, measured on a per capita basis within Tennessee by weight, by December 31, 2003.

T.C.A. § 68-211-861(a)(emphasis added).

The record shows that disposal of construction and demolition waste at a Class III/IV landfill, instead of at a Class I landfill, conserves the use of Class I landfill space for domestic, commercial, and industrial waste, the disposal of which requires more environmental safeguards. In fact, the Southern Services landfill has positively impacted the size of the Region's waste stream, as evidenced by the second paragraph of the "Construction and Demolition Landfills" section of the 1999 Plan, in which the Board describes how

a significant portion of the annual per capita reduction each year of the Region's waste stream has been attained at this facility. The Board has been [sic] this percentage far

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<sup>6</sup>Waste Management contends that this exhibit to the Intervenor's Response is not found anywhere in the Administrative Record and was not considered by the Board in making its decision. However, the Court may take judicial notice of the Metro Region Solid Waste Management Plan. *State by Webster ex rel. Strader v. Word*, 508 S.W.2d 539, 543-44 (Tenn. 1974).

exceeds the amount anticipated in the original Plan. The Board again hopes to be able to reduce that percentage in the future by the implementation of Economic Flow Control and the recycling and composting programs that can then be funded to achieve this goal.

1999 Revisions of Metro Region Solid Waste Management Plan, "Construction and Demolition Landfill", p. 20, ¶16.

As the Southern Services landfill is a Class III/IV Construction and Demolition landfill, and as the 1994 and 1999 Plans failed to place an affirmative recycling or sorting obligation on this class of landfill, the Board's reasoning is unsound and erroneous. Accordingly, the Court cannot find that this rationale is sufficient to uphold the denial of the expansion permit.

***4) Approval of the application would violate a conservation easement into which the company previously entered.***

The Board's final rationale contends that approval of the landfill expansion would violate a conservation easement to which the landfill is subject. Waste Management disputes this statement by the Board, arguing that the Declaration of Restriction entered into by the property's former owner did not create a conservation easement. The Declaration itself states that "[a]ny of the foregoing restrictions may be waived, amended, modified, released, or terminated at any time and from time to time by Declarant upon the written consent of the Department [i.e., TDEC]." Waste Management contends that TDEC's January 27, 2004 issuance of an ARAP permit for the expansion of the landfill constitutes approval for the modification of the Declaration of Restriction. The permit allows the creation of 6.25 new acres of mitigation wetlands in exchange for allowing the filling of 1.25 acres of the wetlands covered by the Declaration, as described in Waste Management's approved plan for the expansion.

In their Response to Waste Management's Brief, the Intervenor failed to address this issue. No justification for this fourth rationale of the Board was presented at oral argument, nor can any valid

justification be found in the record. The Court finds Waste Management's argument persuasive and further finds that the Board erred in denying the application for expansion without any sound basis in reason or fact.

### Conclusion

The Board must accept and approve applications for landfill expansion which are consistent with the Region's Plan for waste management. *Consolidated Waste Systems, L.L.C. v. Solid Waste Region Board*, 2003 WL 21957137 at \* 5 (July 2, 2003, Tenn. Ct. App.); T.C.A. § 68-211-814(b)(2)(B). The Court finds that the Board's stated rationales for its actions are without merit. Its decision denying Waste Management's application for a landfill expansion is arbitrary and capricious, and not supported by substantial and material evidence in the record. Accordingly, the Board's decision denying the permit is reversed and the Board's approval of Waste Management's application on May 13, 2002 is reinstated.

This matter is remanded to the Board for action in accordance with this opinion. Costs are taxed to the Metropolitan Government.

It is so ORDERED.

  
CHANCELLOR CAROL L. MCCOY

cc: John P. Williams, Esquire  
Thomas V. White, Esquire  
Tune, Entrekin & White, P.C.  
AmSouth Center, Suite 1700  
315 Deaderick Street  
Nashville, Tennessee 37238-1700

Thomas G. Cross, Esquire  
Metropolitan Department of Law  
204 Metropolitan Courthouse  
Nashville, Tennessee 37201

Julian W. Blackshear, Jr., Esquire  
Smith, Hirsch, Blackshear and Harris, PLC  
Suite B-105, One Vantage Way  
Nashville, Tennessee 37228

**RULE 58 CERTIFICATION**

A copy of this order has been served by U.S. Mail upon all parties or their counsel named above.

TL  
Deputy Clerk and Master  
Chancery Court

4-7-05  
Date